

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RALPH ALBERTUS HOXIE, II,

Defendant-Appellant.

UNPUBLISHED

May 25, 2001

No. 218494

Sanilac Circuit Court

LC No. 98-004867-FC

Before: K. F. Kelly, P.J., and O'Connell and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions, following a jury trial, of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a) (person under thirteen), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a) (person under thirteen). The trial court sentenced defendant to concurrent terms of ten to thirty years' imprisonment for his CSC I convictions, and three to fifteen years' imprisonment for his CSC II conviction. We affirm.

Defendant's appeal raises several allegations of prosecutorial misconduct. Claims of prosecutorial misconduct are reviewed case-by-case. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). When reviewing alleged instances of prosecutorial misconduct, we examine the pertinent portions of the record and evaluate the prosecutor's remarks and conduct in context. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). The guiding inquiry is whether the prosecutor's conduct and remarks ultimately denied defendant of a fair trial. *People v McAllister*, 241 Mich App 466, 475; 616 NW2d 203 (2000).

Defendant first argues that the prosecution improperly withheld potentially exculpatory evidence, in the form of colposcopic photographs from the gynecological examination of the complainant. Defendant correctly recognizes that the court rules impose a duty of disclosure on the prosecutor in certain circumstances. Specifically, MCR 6.201(B)(1) requires a prosecutor to provide a criminal defendant with "any exculpatory information or evidence known to the prosecuting attorney." See *People v Pruitt*, 229 Mich App 82, 87; 580 NW2d 462 (1992). Defendant argues that the deliberate withholding of this information by the prosecutor denied him of his right to a fair trial. We disagree.

The existence of the photographs became an issue on the first day of trial, when the prosecutor presented the testimony of pediatrician Dr. Norman Carter, M.D., who conducted a gynecological examination of the complainant. Carter indicated that photographs were taken during the colposcope examination of the complainant. Alleging that he was previously unaware of the existence of the photographs, defendant filed a motion to dismiss, asserting that the prosecutor willfully failed to provide these photographs to defendant.

During the subsequent hearing on defendant's motion, the trial court concluded that the photographs were not deliberately withheld from defendant. We review a trial court's factual findings for clear error. *People v Williams*, 228 Mich App 546, 557; 580 NW2d 438 (1998). Our review of the record leaves us unable to conclude that the trial court's finding was clearly erroneous.

During the hearing on defendant's motion, the prosecutor stated that he was unaware of the existence of the photographs before Carter testified on the first day of trial. Further, the record reveals that both the prosecutor and defense counsel were in possession of a medical report prepared by Carter that referred to the photographs, however no efforts were made by defense counsel to obtain them.

We are not inclined to conclude that the prosecutor engaged in misconduct relating to the discovery of this evidence when there is nothing in the record to suggest (1) that the prosecutor was in possession of these photographs, or (2) that the prosecutor deliberately withheld information relating to these photographs. Further, given the overwhelming evidence against defendant adduced at trial,¹ we are confident that the outcome of these proceedings would not have been different had defense counsel diligently obtained these photographs. See *People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998) (reversal not warranted where there is not a reasonable probability that result of trial would have been different had evidence been disclosed).

Defendant also argues that his right to a fair trial was undermined when the prosecutor spoke with defendant's expert witness. According to defendant, when trial proceedings were adjourned one day because of inclement weather, the prosecutor asked to speak with the witness, who had been scheduled to testify. Defendant further alleges that the prosecutor provided the witness with a copy of the transcript of a phone call in which defendant confessed to digitally penetrating the complainant. Defendant alleges that the prosecutor's conduct motivated the expert to refuse to testify on defendant's behalf.

¹ The prosecution's case against defendant included the testimony of a Michigan State Police officer and Family Independence Agency caseworker to whom defendant confessed that he had digitally penetrated the complainant on two different occasions. Further, the prosecution offered the complainant's testimony that defendant digitally penetrated her on two occasions, and touched her inappropriately on another. The prosecution also played a tape of a recorded three-way phone conversation between defendant, the complainant, and the complainant's mother in which defendant admitted to digitally penetrating the complainant during a body massage.

We recognize the well-settled principle that a prosecutor may not intimidate a witness either inside or outside of the courtroom. *People v Layher*, 238 Mich App 573, 587; 607 NW2d 91 (1999). Attempts by a prosecutor to intimidate a witness from testifying, if successful, can amount to a violation of a defendant's right to due process. *People v Canter*, 197 Mich App 550, 569-570; 496 NW2d 336 (1992); *People v Stacy*, 193 Mich App 19, 25; 484 NW2d 675 (1992); *People v Pena*, 383 Mich 402, 406; 175 NW2d 767 (1970).

After raising this issue during the hearing on defendant's motion to dismiss, the trial court concluded that there was no evidence that the prosecutor was at fault for the witness' decision to not testify. A review of the record demonstrates that the trial court reached this conclusion because defendant did not present admissible testimonial evidence to suggest otherwise.² On this record, we are satisfied that the prosecutor did not undermine defendant's right to a fair trial. Although it appears that the prosecutor spoke briefly with the witness, there is no indication in the record that the prosecutor intimidated the witness.

Defendant also argues that he was prejudiced by improper comments the prosecutor made during opening and closing arguments. Specifically, defendant challenges the prosecutor's reference to the burden of proof in criminal cases, and his statement "that hundreds of guilty people go free to protect the innocent." Viewing these comments in context, we are not persuaded that they were improper. Rather, the prosecutor was clearly describing his duty to prove defendant's guilt beyond a reasonable doubt, and the difficulties of satisfying this standard.

We also reject defendant's contention that the prosecutor's remarks during closing argument amounted to improper vouching for a witness' credibility. See *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Our review of the record demonstrates that the prosecutor was merely enunciating the well-settled principle that the lawyers' comments are not to be considered by the jury as evidence.³

Defendant next argues that the trial court was clearly biased against defendant. As a preliminary matter, we note that this issue is not properly preserved for our review because defendant did not move for disqualification of the trial court. MCR 2.003(A). In any event, after a careful review of the record, we conclude that defendant has failed to meet his burden of establishing actual bias on the part of the trial court. *People v Gomez*, 229 Mich App 329, 331; 581 NW2d 289 (1998).

Defendant's first claim of judicial bias turns on his assertion that the trial court did not allow substitute counsel sufficient time to prepare for trial. We disagree. Our review of the record demonstrates that the trial court initially delayed the trial date for a five-week period after

² Specifically, the trial court observed that defense counsel failed to take steps to secure the witness' presence in court for the hearing by way of subpoena, despite having ample opportunity to do so.

³ Had we accepted defendant's contentions that these comments were improper, reversal would not be warranted because any prejudice was cured by the trial court's instruction to the jury that the lawyers' comments are not evidence. *People v Knapp*, 244 Mich App 361, 382-383; 624 NW2d 227 (2001).

defendant discharged his first attorney and obtained substitute counsel. The trial court further granted a one month continuance on the eve of trial in December 1998. That the trial court took pains to accommodate defense counsel and safeguard defendant's right to a fair trial is best demonstrated by its decision to grant a one-week continuance in the middle of trial for defendant to obtain an expert witness and copies of the photographs taken during the gynecological examination of the complainant.

Further, we do not share defendant's view that the trial court impatiently and unfairly disposed of defendant's claims of prosecutorial misconduct. Our review of the record reveals that the trial court conscientiously and fairly considered the merit of each of defendant's claims. That the trial court admonished defense counsel to stay within the parameters of his respective motions and adhere to an organized and coherent argument is not indicative of actual bias against defendant.

Defendant also contends that trial court failed to assist defendant in obtaining the photographs taken during the examination of the complainant. In our view, defendant is hard-pressed to advance this argument where the record clearly reveals that the trial court made every effort to facilitate this endeavor. Specifically, defendant implies that the trial court was responsible for the delay in entering an order instructing the medical institution to release the photographs to defendant.

In our opinion, a review of the record indicates that there is absolutely no evidence that the trial court was responsible for the delay between the drafting of the order and when it was entered. Similarly, we are baffled by defendant's attempt to hold the trial court accountable for the crude appearance of the order when a review of the document reveals that defense counsel drafted it.

Defendant next argues that the trial court showed bias by refusing to allow defendant to question the complainant's mother about whether she had accused another individual of raping one of her other daughters in 1993. According to defendant, this information was relevant to the complainant's mother's credibility. We review a trial court's evidentiary decisions for an abuse of discretion. *People v Aguwa*, ___ Mich App ___ ; ___ NW2d ___ (Docket No. 217104, issued 3/6/01) slip op p 3. We conclude that the trial court did not abuse its discretion in circumscribing this line of inquiry by defendant. As the trial court observed, the incident in question involved a collateral matter remote in time. Further, we agree with the trial court's conclusion that any probative value of the evidence was substantially outweighed by its prejudicial effect. MRE 403.

We also reject defendant's assertion that the trial court abused its discretion in not allowing a witness to testify during the hearing on his motion for a new trial. According to defendant, the witness appeared in court after the trial court closed the proceedings. However, a review of the record demonstrates that the trial court declined to hear the witness' testimony because defense counsel did not notify the witness that he was required to be in court until the night before the hearing. On this record, where it is abundantly clear that defense counsel failed to take the necessary steps to ensure the witness' timely attendance in court despite having ample opportunity to do so, the trial court's decision was not an abuse of its discretion.

Defendant also argues that the trial court erred in failing to grant his motion for a new trial on the basis of newly discovered evidence. We review a trial court's decision on a motion for a new trial for an abuse of discretion. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000). To succeed in a motion for a new trial on the basis of newly discovered evidence, a defendant must meet the following requirements:

(1) the evidence itself, not merely its materiality, is newly discovered, (2) the evidence is not merely cumulative, (3) the evidence is such as to render a different result probable on retrial, and (4) the defendant could not with reasonable diligence have produced it at trial. [*Lester, supra* at 271, citing *Canter, supra*.]

In this case, defendant is not entitled to a retrial on the basis of newly discovered evidence. The record is clear that the photographic evidence, as well as the identity of the witness Jeff Doerr, were known to defendant during the course of trial. Nor are we convinced that the introduction of this evidence would render a different result probable on retrial. *Id.*

Finally, defendant argues that he was denied the effective assistance of counsel. To demonstrate ineffective assistance of counsel, defendant must show that counsel's performance was objectively unreasonable and that defendant suffered prejudice. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Because defendant did not move for a new trial on this issue or a *Ginther*⁴ hearing, our review is limited to errors apparent from the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

Defendant's ineffective assistance claim hinges on his complaint that his initial trial counsel failed to adequately prepare for trial. Our review of the record reveals no indication of ineffective performance on the part of defendant's initial trial counsel. Even if we were to accept defendant's contention that his initial counsel's performance was deficient, we are not persuaded that defendant has demonstrated a "reasonable probability that, but for counsel's unprofessional errors, the result [of trial] would have been different." *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999), quoting *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Peter D. O'Connell
/s/ Jessica R. Cooper

⁴ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).